Phileo Promenade Sdn Bhd & Anor v Premier Model (M) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-625 OF 1999
MOKHTAR SIDIN, ALAUDDIN AND ABDUL AZIZ JJCA
29 NOVEMBER 2002

Civil Procedure *— Judgment and orders — Alteration of — Whether paragraphs in High Court judge's judgment could be expunged*

The respondents (as plaintiffs) by an originating summons commenced proceedings against the appellants (as defendants) in the High Court to obtain certain reliefs arising from 16 sale and purchase agreements. Several affidavits were filed by both parties in respect of the originating summons. The appellants filed two applications by summons in chambers, ie encl 38 for striking out one of the respondents' affidavits and encl 41 for an order that the proceedings be continued as if they had been begun by writ. The judge struck out encl 38 upon its withdrawal by the appellant with no order as to costs. The appellants' counsel said, in withdrawing the application, that it was without prejudice to the appellants' right to object to the admissibility of the evidence of the affidavit concerned, but the judge denied the appellants that reservation. After hearing submission on the application as to the form of proceedings, encl 41, the judge dismissed it. The appellants' solicitors filed a notice of appeal to the Court of Appeal. The first part of the notice identified the decision with which the appellants were dissatisfied and the second part identified the part of the decision appealed against. The judge wrote his grounds of decision for both decisions for purposes of the appeal since to him the notice was not clear as to which decision the appellants were appealing against. The appellants complained that the grounds contained three paragraphs that should be expunged. In the appellants' memorandum of appeal, in addition to the grounds for challenging the decision to dismiss encl 41, there was included, in para 3.3, the ground that the learned judge had erred in fact and/or in law by holding that the notice of appeal in this case did not specify which particular application the appellants were appealing against. On 18 September 2002, learned counsel for the appellants indicated that the appellants would proceed to submit only on ground 3.3 and sought expunction of the three paragraphs.

Held, allowing the appeal:

(1) It is clear from the second part of the notice of appeal that the appellants were only appealing against the dismissal of the application in encl 41 even though the first part did not expressly exclude the decision on encl 38 from the appellants' dissatisfaction. The judge was clearly wrong not to know which decision the appellants were appealing from (see pp 163F, 164E).

(2) The three paragraphs in this case ought to be expunged. The remarks made against the appellants' solicitors stemmed from an undubitable misreading by the judge of the notice of appeal. The remarks cast aspersions on the professional competence of the appellants' solicitors. They were said to have failed in a paramount duty and to have occasioned wastage of much judicial time. If the remarks were not expunged the stigma on them would continue to be on record (see p 167A–B).

(3) Although, in view of the manner in which events took place as has been set out, there had strictly speaking been no appeal in the notice of appeal against the remarks, the appeal only coming in through the inclusion of grounds 3.3 in the memorandum of appeal, the court could entertain it as a matter ancillary to the appeal brought by the notice of appeal (see p 167D).

[Bahasa Malaysia summary

Responden-responden (sebagai plaintif-plaintif) melalui saman pemula telah memulakan prosiding terhadap perayu-perayu (sebagai defendan-defendan) di dalam Mahkamah Tinggi untuk mendapatkan relif-relif yang berbangkit daripada 16 perjanjian jual beli. Beberapa afidavit telah difailkan oleh kedua-dua parti berkenaan saman pemula tersebut. Perayu-perayu telah memfailkan dua permohonan melalui saman dalam kamar, iaitu lampiran 38 untuk membatalkan salah satu daripada afidavit responden-responden dan lampiran 41 untuk suatu perintah bahawa prosiding diteruskan seperti jika ia dimulakan melalui writ. Hakim telah membatalkan lampiran 38 setelah ia ditarik balik oleh perayu-perayu tanpa perintah untuk kos. Peguam perayu-perayu telah mengatakan, dalam menarik balik permohonan tersebut, bahawa ini adalah tanpa prejudis kepada hak perayu-perayu untuk membantah kepada kebolehterimaan keterangan afidavit berkenaan, tetapi hakim tidak membenarkan hak tersebut. Setelah mendengar hujahan di atas permohonan mengenai bentuk prosiding, lampiran 41, hakim telah menolaknya. Peguam perayu-perayu telah memfailkan satu notis rayuan kepada Mahkamah Rayuan. Keputusan yang perayu-perayu tidak berpuas hati dikenalpasti melalui bahagian pertama notis tersebut dan bahagian yang dirayukan oleh perayu-perayu telah dikenalpasti melalui bahagian kedua. Hakim telah menulis alasan-alasan untuk kedua-dua keputusan beliau untuk rayuan tersebut memandangkan notis tersebut tidak jelas di dalam menyatakan keputusan hakim yang mana dirayukan oleh perayu-perayu. Perayu-perayu telah mengadu bahawa terdapat tiga perenggan di dalam keputusan hakim tersebut yang patut dipadamkan. Di dalam memorandum rayuan perayu-perayu, bersama dengan alasan-alasan yang mencabar keputusan hakim yang menolak lampiran 41 terdapat, di dalam perenggan 3.3, alasan bahawa hakim yang arif telah terkhilaf di sisi fakta dan/atau undang-undang dengan memutuskan bahawa notis rayuan di dalam kes ini tidak menentukan

permohonan yang dirayukan oleh perayu-perayu. Pada 18 September 2002, peguam yang arif untuk perayu-perayu telah mengatakan bahawa perayu-perayu akan berhujah hanya di atas perenggan 3.3 dan memohon pemadaman tiga perenggan tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Ia adalah jelas daripada bahagian kedua notis rayuan bahawa perayu-perayu hanya merayu terhadap penolakkan permohonan di dalam lampiran 41 walaupun bahagian pertama tidak dengan nyata mengecualikan keputusan lampiran 38 daripada ketidakpuasan perayu-perayu. Hakim dengan jelas terkhilaf dengan tidak mengenalpasti keputusan yang dirayukan oleh perayu-perayu (lihat ms 163F, 164E).

(2) Tiga perenggan di dalam kes ini patut dipadamkan. Pernyataan yang dibuat terhadap peguam perayu-perayu berpunca daripada salah bacaan notis rayuan tersebut yang nyata oleh hakim. Pernyataan-pernyataan tersebut telah memfitnah kecekapan profesional peguam perayu-perayu. Mereka dikatakan telah gagal di dalam kewajipan paling utama dan telah membuang masa mahkamah. Jikalau pernyataan-pernyataan tersebut tidak dipadamkan, stigma di atas mereka akan terus berada pada rekod (lihat ms 167A–B).

(3) Walaupun, memandangkan bagaimana peristiwa-peristiwa telah berlaku, tidak terdapat sebarang rayuan di dalam notis rayuan terhadap pernyataan-pernyataan tersebut, rayuan hanya masuk melalui pemasukkan alasan 3.3 di dalam memorandum rayuan, mahkamah dapat mendengarnya sebagai perkara sampingan kepada rayuan yang dibawa oleh notis rayuan tersebut (lihat ms 167D).

Notes

For cases on alteration of judgments and orders, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3438–3439.

Cases referred to

AM Mathur v Pramod Kumar Gupta & Ors [1990] 2 SCC 533 (refd)
Premier Model (M) Sdn Bhd v Phileo Promenade Sdn Bhd & Anor [2000] 1 MLJ 364 (refd)
State of Uttar Pradesh v Mohd Naim 1964 AIR SC 703 (distd)
V Sujatha v State of Kerala [1994] SCC Supp (3) 437 (refd)

Legislation referred to

Rules of the Court of Appeal 1994 Form 1 to the First Sch

Appeal from: Originating Summons No S2–24–431 of 1999 (High Court, Kuala Lumpur)

DP Naban (*BH Yap* with him) (*Lee Hishammuddin*) for the appellants. A
DP Naban mentioning for *Jaffar & Menon*, solicitors for the respondents.

Abdul Aziz JCA (delivering judgment of the court): This appeal resulted in our ordering, on 18 September 2002, and after hearing the appellants' counsel, the respondents not objecting, the expunction of three paragraphs in the written judgment of the learned judge which is reported as *Premier* B *Model (M) Sdn Bhd v Phileo Promenade Sdn Bhd & Anor* [2000] 1 MLJ 364.

The respondent company was the purchaser under 16 sale and purchase agreements between them and the first appellant company of 16 units in a multi-storey shop office building complex belonging to the first appellant. The second appellant company was the first appellant's property C manager whose functions included the collection of charges for services and amenities from purchasers of units in the building complex.

Alleging as their grounds that the appellants or either one of them had obstructed or discontinued the supply of basic amenities, such as water and electricity, and had threatened to discontinue lift and other services, to which basic amenities and services the respondents claimed they were D entitled under the sale and purchase agreements, the respondents, by an originating summons, commenced (as plaintiffs) proceedings in the High Court to obtain certain reliefs. Several affidavits were filed by both parties in respect of the originating summons.

The appellants (as defendants) filed in those proceedings two E applications by summons in chambers. One, encl 38, was for the striking out of one of the respondent's affidavits. The other, encl 41, was for an order that the proceedings be continued as if they had been begun by writ.

Both the applications came on for hearing before the learned judge on 13 July 1999. The judge struck out the application as to the affidavit, F encl 38, upon its withdrawal by the appellants, with no order as to costs. In withdrawing that application, the appellants' counsel had said that it was without prejudice to the appellants' right to object to the admissibility of the evidence in the affidavit concerned, but the judge denied the appellants that reservation. After hearing submission on the application as to the form of proceedings, encl 41, the judge dismissed it. All that happened on 13 July G 1999.

On 12 August 1999, the appellants' solicitors filed a notice of appeal to the Court of Appeal. The notice of appeal was in the following terms:

> Sila ambil perhatian bahawa [*the appellants*] yang tidak berpuas hati dengan keputusan [*of the judge*] yang diberikan di Kuala Lumpur pada 13 Julai 1999 H merayu kepada Mahkamah Rayuan terhadap hanya sebahagian sahaja daripada keputusan tersebut yang memutuskan bahawa saman dalam kamar bertarikh 7 Jun 1999 (kandungan no 41) hendaklah ditolak dengan kos. (Emphasis added.)

There are two parts to the notice of appeal. The first part identifies the decision with which the appellants were dissatisfied. The identification is by I way of the date on which the decision was given. The second part specifies the part of the decision that was appealed against.

A The notice of appeal was in strict accordance with the form prescribed as Form 1 to the First Schedule to the Rules of the Court of Appeal 1994, which sets out the notice as follows:

> Take notice that ..... being dissatisfied with the decision(s) of the Honourable Mr Justice ..... given at ..... on the ..... day of .....
> B 19..... appeals to the Court of Appeal against
> the whole of the said decision(s)
> either/or such part only of the said decision(s)
> as decides that
> (set out details)

C Such being the way the notice is prescribed — that is, as contemplating a decision or decisions on one action or application — where decisions are given on the same date on two different interlocutory applications in one case and an appellant intends to appeal against the decision on one of the applications only, he will not be able, in the first part of the notice of appeal, without making some modification, to identify which of the two decisions he
D is dissatisfied with. That is because the prescribed identification is by date only. He will not be able in the first part, without making some modification, to make it clear that he is not dissatisfied with the decision on the other application given on the same date, but in the second part he will specify which decision he is actually appealing against, so that reading the notice of appeal as a whole, it should be beyond doubt that he is appealing against that
E decision only and therefore he cannot be dissatisfied with the other decision. In any case, since it will be clear from the second part of the notice of appeal which decision he is appealing against, it should not matter if the first part is understood to mean that he is also dissatisfied with the other decision. It has to remain simply as a matter of dissatisfaction. The fact is that he is not appealing against that decision but only against the other decision.

F In this case, it is clear from the second part of the notice of appeal that the appellants were only appealing against the dismissal of the application in encl 41 even though the first part does not expressly exclude the decision on encl 38 from the appellants' dissatisfaction.

G The judge wrote his grounds of decision (actually headed 'judgment') for the purposes of the appeal on 30 September 1999, after the filing of the appellants' notice of appeal. To him, the notice of appeal was not clear as to which decision the appellants were appealing against, whether it was the decision dismissing the application in encl 41 or the decision on encl 38 denying the appellants the right to object to the affidavit concerned or whether it was both the decisions. So he wrote out his grounds for both the
H decisions. This is what he said at p 368 of the report in the paragraph on encl 38 and in the immediately preceding paragraph:

> *Although the notice of appeal states that the defendants are appealing against my decision given on 13 July 1999, I had in fact given two decisions on 13 July 1999 in respect of two enclosures, namely encl 38 and encl 41.*
>
> I *Enclosure 38*
>
> This was an application by the defendants to strike out one of the affidavits affirmed by the plaintiff's representative. On the morning of 13 July 1999,

Mr KK Wong for the defendants applied to withdraw encl 38 with no order as to costs and without prejudice to the defendants' right to object to the admissibility of the evidence, which was the subject of encl 38. Mr Menon for the plaintiff objected to the conditions laid out. He contended that if an application was to be withdrawn that was the end of the matter.

Since I do not know which enclosure the defendants are appealing against I am compelled in the interest of justice to write my judgment in respect of both applications. I think it is the paramount duty of counsel to indicate in his notice of appeal the particular enclosure he is appealing against to save the court much judicial time.

I am of the view that once there is a withdrawal of an application, unless the respondent agrees to the terms or conditions stipulated for the withdrawal, there can be no arbitrary terms or conditions that the applicant ought to stipulate, so long as he is unwilling to proceed with his application.

I had in fact struck out this application with no order as to costs. Since counsel for the defendants has put the court in this situation of having to write a judgment in respect of two enclosures, without stating which he is appealing against and since the order in respect of this application has not even been filed in draft form, I am inclined to vacate my order in respect of costs and to order that the defendants do pay the costs of the dismissal of encl 38 to be agreed or taxed. (Emphasis added.)

The paragraphs that the appellants complained of and that we ordered to be expunged are the three paragraphs in that passage that are reproduced in italics.

In view of what we have said about the notice of appeal, the judge was clearly wrong not to know which decision the appellants were appealing from. Presumably since the paragraphs complained of were the result of an unwarranted misreading by the judge of the notice of appeal, which was a notice of appeal against the decision on encl 41, and since what was said in those paragraphs was said after the appellants had filed their notice of appeal, in their memorandum of appeal dated 1 November 1999, in addition to the grounds for challenging the decision to dismiss encl 41, there was including the following ground in paragraph 3.3:

> The learned judge erred in fact and/or in law by holding that the notice of appeal in this case did not specify which particular application the appellants were appealing against.

When the appeal came to be heard on 18 September 2002, learned counsel for the appellants indicated that the appellants did not wish to proceed with the substantive appeal against the dismissal of encl 41 and proceeded to submit only on ground 3.3 in the memorandum of appeal. As a relief arising from that ground, he sought the expunction of the three paragraphs. He was also mentioning on behalf of the respondents' solicitors who, he said, had no objection to the expunction. We need to say, however, that the fact that the respondents' solicitors did not object to the expunction was not necessarily a reflexion of their views as to the justifiability of the expunction because it was a matter that did not concern the respondents and that the respondents, not having an interest in it, had no reason to object to.

The last two of the three paragraphs bear a finding by the judge that the appellants' 'counsel' — properly solicitors — had failed in what was said to

A be their 'paramount duty' to state in the notice of appeal which decision the appellants were appealing against and that the consequence of that failure was that much judicial time had been wasted by reason of the judge having to write a judgment in respect of two decisions instead of only one, a consequence that the judge considered so serious that he felt inclined to order the defendants to pay the costs of the 'dismissal' — striking out, B according to the notes of proceedings — of encl 38 even though he had already made an order of no costs.

The first of the three paragraphs, although innocuous by itself, is introductory to the judge's unwarranted criticism of the notice of appeal which is brought out in the other two paragraphs.

C We agreed with counsel for appellants that the three paragraphs, taken as a whole, contain unjustified adverse remarks affecting the professional competence of the appellants' solicitors. If the paragraphs are not expunged, they will remain in the books as an indictment of and a stigma on the appellants' solicitors.

D The appellants' counsel cited several Indian cases in which courts had expunged unwarranted remarks by judges affecting the character or reputation of persons. We would mention only three.

In *State of Uttar Pradesh v Mohd Naim* 1964 AIR SC 703, an investigation officer, Mohammed Naim, was given notice to show cause E why a complaint should not be made against him for fabricating a first information report. The officer appeared before the High Court judge and begged for forgiveness. In accepting the officer's apology, the judge made certain remarks derogatory of the police force of the State of Uttar Pradesh. The State made an application to expunge the remarks. The application was heard by another High Court judge who dismissed it. The State appealed F to the Supreme Court. One question that the Supreme Court considered was whether the High Court had inherent power to expunge the remarks. The Supreme Court held at p 707 that:

> ... the High Court can in the exercise of its inherent jurisdiction expunge remarks made by it or by a lower court if it be necessary to do so to prevent abuse of the process of the court or otherwise to secure the ends of justice; the G jurisdiction is however of an exceptional nature and has to be exercised in exceptional cases only.

The Supreme Court allowed the appeal and directed expunction.

In terms of procedure, that case is different from the present case H because there an application was first made to the High Court for expunction and the matter went up to the appellate court by way of appeal from the High Court's refusal to expunge, whereas in the present case there had been no application to the High Court to expunge the paragraphs but the appellants sought expunction direct from the appellate court through their substantive appeal from the High Court.

I In *AM Mathur v Pramod Kumar Gupta & Ors* [1990] 2 SCC 533, the Supreme Court had, on appeal, set aside a judgment of the High Court which had allowed certain writ petitions challenging a policy decision of the

State Government of Madhya Pradesh concerning 'the grant for construction of new distilleries': see para 3. Mr AM Mathur, the Advocate General, had assisted in arguing the State's appeal. Subsequently someone filed a petition to review the decision of the Supreme Court, alleging that the judgment of the Supreme Court was procured by the State Government by fraud. The review petition was heard by two judges of the High Court. They dismissed the review petition on technical grounds, each doing so on different dates, but Mr BM Lal, who was the later to pronounce his decision, in pronouncing his decision made certain remarks that cast aspersions on the professional conduct of Mr AM Mathur, who had by then resigned as Advocate General, by saying, among other things, that had Mr Mathur acted in a bona fide and honest manner when giving a certain briefing to the Chief Minister, the fraud on the court would have been avoided. Mr Mathur appealed to the Supreme Court. The Supreme Court, finding the remarks wholly and utterly unjustified and unwarranted, allowed the appeal and expunged the remarks.

In that, the aggrieved person went direct to the appellate court to complain about the remarks, that case provides a parallel to the present case.

In *V Sujatha v State of Kerala* [1994] SCC Supp (3) 437, a High Court judge, in upsetting the acquittal by the Chief Judicial Magistrate (V Sujatha) of certain accused persons in two separate cases, made certain harsh, adverse and derogatory remarks about the Chief Judicial Magistrate. The Chief Judicial Magistrate appealed to the Supreme Court, seeking expunction of the remarks. The accused concerned also appealed to the Supreme Court against the decisions of the High Court judge. The Supreme Court allowed the accused's appeals, restoring the judgments and orders of the Chief Judicial Magistrate, and they stood acquitted. The Supreme Court also allowed the appeal of the Chief Judicial Magistrate and ordered expunction of the remarks.

Of relevance is the following remarks by the Supreme Court in para 26:

> In both the upset judgments of Padnamabhan J adverse remarks have been made against Mrs V Sujatha, the appellant herein. Those judgments of the High Court do not remain operative and the judgments and orders passed by her in both cases have been restored. The adverse remarks in a sense are no longer legally tenable or existing, but they do stay written in court records all the same.

The last sentence recalls what we said earlier about uncalled for derogatory remarks continuing to remain on record if not expunged or ruled as expunged.

Of interest is another aspect. In one of the two cases, the acquittal of the accused by the Chief Judicial Magistrate was upon appeal to the Chief Judicial Magistrate from a conviction by a Judicial Magistrate, Second Class. In allowing the appeal, the Chief Judicial Magistrate had also made a harsh, uncalled for remark about the Judicial Magistrate, Second Class. In allowing the Chief Judicial Magistrate's appeal, the Supreme Court also expunged the Chief Judicial Magistrate's remarks about the Judicial

A Magistrate, Second Class, even though there was no application or appeal by the latter in that behalf.

We were of the view that the three paragraphs in this case ought to be expunged. The remarks made against the appellants' solicitors stemmed from an undubitable misreading by the judge of the notice of appeal. The remarks cast aspersions on the professional competence of the appellants' solicitors. They were said to have failed in a paramount duty and to have occasioned wastage of much judicial time. If the remarks were not expunged the stigma on them would continue to be on record.

Although the appeal before us, as far as it concerned the matter of the expunction, was not that of the solicitors themselves but of their clients the appellants, we were of the view that the appellants had an interest in the matter and that we could entertain the appeal because the blame for the wastage of judicial time could be viewed as also being attributed to them since the judge felt inclined to punish them by making them bear the costs of the appeal as regards encl 38.

Finally, we wish to say that although, in view of the manner in which events took place as has been set out, there had strictly speaking been no appeal in the notice of appeal against the remarks, the appeal only coming in through the inclusion of grounds 3.3 in the memorandum of appeal, we were of the view that we could entertain it as a matter ancillary to the appeal brought by the notice of appeal.

Appeal allowed.

Reported by Chew Phye Ken